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Ng Li Lin (P) v Ting Tian Hwa

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HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO 24NCVC-444–12 OF 2015
VAZEER ALAM J
16 NOVEMBER 2016

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Family Law — Matrimonial property — Matrimonial home — Wife petitioning for divorce attempted to sell matrimonial home after leaving it following discord with husband — Wife intended to use proceeds of sale to pay chargee bank which commenced foreclosure proceedings on property — Husband who made small contribution towards purchase of home lodged private caveat to prevent sale by wife — Whether in absence of other grounds giving rise to possible caveatable interest both spouses only indeterminate/inchoate interest in matrimonial assets until family court determined how they should be divided on making a decree of divorce or judicial separation — Law Reform (Marriage and Divorce) Act 1976 ('the LRMDA'), s 76 — Whether husband should have applied for injunction under s 102 of the LRMDA if he genuinely wanted to prevent dissipation of matrimonial asset — Whether facts however showed husband no such intention — Whether husband failed to rebut presumption that his contribution towards acquisition of matrimonial home gift to his wife

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Land Law — Caveats — Caveatable interest — Husband lodged private caveat to prevent wife from selling matrimonial home after their marriage fell apart — Wife owned home, left the property and petitioned for divorce — Husband contributed small payment towards purchase of property — Purchase price substantially paid by wife through own resources and through bank loan — Bank commenced foreclosure proceedings on loan default by wife compelling her to sell property to pay bank — Whether husband's contribution gave him caveatable interest in property — Whether in absence of other grounds that could give rise to caveatable interest both parties only indeterminate/inchoate interest in matrimonial home until such time Family Court determined how matrimonial assets should be divided on making decree of divorce or judicial separation — Whether husband failed to show any definite, determinate and registrable interest in property that gave him a caveatable interest — Whether husband failed to show there serious question that merited trial — Whether wife succeeded in showing balance of convenience/balance of justice lay in favour of removal of caveat

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The plaintiff ('Ng') in the instant case applied to the High Court under ss 327–329 of the National Land Code to, inter alia, remove a private caveat ('the caveat') that her husband, the defendant ('Ting') had entered on their

matrimonial home ('the property'). Ng was the registered owner of the property which the parties had bought during their marriage for RM900,000. Although Ting had paid RM50,000 towards the purchase price, the property was bought solely in Ng's name. She paid RM84,667 and took out a bank loan for the balance purchase price and paid the monthly instalments for the loan for three years until, due to marital discord, she left the property with two of her three children, leaving the youngest child with Ting. Several months later, Ng petitioned for divorce from Ting. At the time the instant application to remove the caveat came up for hearing, the petition had not yet been heard. Having left the property and not receiving any financial support from Ting, Ng went into arrears in settling her loan repayments, causing the bank to commence foreclosure proceedings and leaving Ng with no alternative but to sell the property to pay the bank. Ting's caveat, however, frustrated her efforts to do so. Ting claimed he had a caveatable interest in the property because his RM50,000 contribution to its acquisition gave him a beneficial interest in it. Ng denied Ting's claim saying that he had gifted the said amount to her. Apart from lodging the caveat, Ting did not file any other proceeding to claim any legal or beneficial interest in the property.

Held, allowing the application to remove the caveat:

(1) In respect of assets acquired during a marriage, ie, matrimonial assets, the exclusive jurisdiction to decide on the rights of the parties to a share in such assets lay with the High Court in the exercise of its matrimonial jurisdiction. That jurisdiction could only be exercised 'when granting a decree of divorce or judicial separation' under s 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRMDA'). Until the High Court decided the apportionment of the assets between the husband and wife, the interest of both spouses in any particular asset remained indeterminate and inchoate, and thus, the interest was not a caveatable one. If the purpose of the lodgment of a private caveat was to protect a matrimonial asset from being disposed of or dissipated, then the more appropriate remedy was to apply for an injunction under s 102 of the LRMDA. The defendant did not seek that remedy but took the easier route, the path of least resistance, by entering the caveat. This he had done without paying the monthly instalments to the chargee bank, knowing well that that would mean the plaintiff would be in default of the loan. Though the chargee bank had commenced foreclosure action, the defendant did not make any attempt to regularise the loan default. Thus, his claim that he was protecting a matrimonial asset by lodging the caveat rang hollow (see paras 29 & 42).

(2) Despite his initial payment of RM50,000 towards the acquisition of the property, the defendant had allowed the plaintiff to be the sole purchaser and registered owner of the property. The bank loan was in her name. The plaintiff contended that these facts pointed to an intention on the

defendant's part that his contribution was a gift to her; that a presumption of advancement applied in her favour negating any presumption of a resulting trust in his favour. The presumption of advancement was rebuttable but the defendant failed to adduce sufficient evidence in that regard. Apart from paying the RM50,000 deposit and six monthly instalments in 2014, there was no evidence of any direct financial contribution by the defendant towards the purchase of the property. The plaintiff had paid the balance of the purchase price with her own financial resources and through the bank loan (see paras 43–44 & 46).

(3) The defendant failed to show that there was a serious question that merited a trial and on this score too, the caveat could not stand. If the defendant had successfully rebutted the presumption of advancement and shown that the intention of the parties was for the plaintiff to hold the property on a resulting trust for him, then that would have been a serious question to be tried; then he would have had an interest capable of leading to registration and that would be a caveatable interest. The defendant did not allude to any such trust in the Form 19B or in his statutory declaration nor did he adduce sufficient evidence in that regard. He did not file any proceedings in court to assert his claim of a resulting trust. His failure to commence any proceedings whatsoever to enforce his alleged interest in the property was fatal (see paras 47–50).

(4) The plaintiff had established that the balance of convenience or balance of justice lay in favour of removal of the caveat because if it was not removed, the plaintiff would not be able to proceed with the sale of the property and the chargee bank would continue with its foreclosure action leading to the property being auctioned off. If indeed the defendant was the beneficial owner, he should have stepped in to regularise the loan and saved the property from foreclosure action. The fact that he did not do so and left the plaintiff to the mercy of the chargee bank diminished his case for the caveat to remain. The caveat stood entirely without any basis and it ought to be removed (see para 51).

(5) The manner in which the defendant's alleged caveatable interest was set out in the prescribed documents for its entry was flawed and failed to meet the minimum legal requirement of stating the exact nature and extent of his alleged beneficial interest. The nature of his claim was vague and ambiguous. He had not shown a definite, determinate and registrable interest in the property and this, by itself, was sufficient reason for the court to remove the caveat (see paras 20–21).

[Bahasa Malaysia summary

Plaintif ('Ng') dalam kes ini telah memohon kepada Mahkamah Tinggi di bawah ss 327–329 Kanun Tanah Negara untuk, antara lain, membatalkan

kaveat persendirian ('kaveat tersebut') yang mana suaminya, defendan ('Ting') telah memasuki ke atas rumah perkahwinan mereka ('hartanah tersebut'). Ng adalah pemilik berdaftar hartanah tersebut yang mana pihak-pihak telah membelinya semasa perkahwinan mereka untuk RM900,000. Walapun Ting telah membayar RM50,000 terhadap harga belian, hartanah tersebut telah dibeli hanya atas nama Ng sahaja. Dia telah membayar RM84,667 dan telah mengambil pinjaman bank untuk baki harga belian dan membayar ansuran bulanan untuk pinjaman bagi tiga tahun sehingga, akibat kegagalan perkahwinan itu, dia meninggalkan hartanah tersebut bersama dua daripada tiga anak-anaknya, meninggalkan anak bongsunya dengan Ting. Beberapa bulan kemudian, Ng telah membuat petisyen untuk perceraian daripada Ting. Pada masa itu permohonan ini untuk membatalkan kaveat tersebut dikemukakan untuk dibicarakan, petisyen tersebut masih belum dibicarakan. Setelah meninggalkan hartanah tersebut dan tidak menerima apa-apa sokongan kewangan daripada Ting, Ng telah gagal menyelesaikan bayaran balik pinjamannya, menyebabkan bank memulakan prosiding pelupusan dan meninggalkan Ng tanpa apa-apa alternatif kecuali untuk menjual hartanah tersebut bagi membyar bank tersebut. Kaveat Ting, bagaimanapun, telah mengecewakan usahanya untuk berbuat demikian. Ting mendakwa di mempunyai kepentingan yang boleh mengkaveat hartanah tersebut kerana sumbangan RM50,000 kepada pemerolehannya memberinya kepentingan benefisial ke atasnya. Ng menafikan tuntutan Ting dengan menyatakan bahawa dia telah menghadiahkan jumlah tersebut kepadanya. Selain daripada memasukkan kaveat tersebut, Ting tidak memfailkan apa-apa prosiding lain untuk menuntut apa-apa kepentingan sah atau benefisial dalam hartanah tersebut.

Diputuskan, membenarkan permohonan untuk membatalkan kaveat:

(1) Berhubung aset-aset yang diperoleh sepanjang perkahwinan, iaitu aset-aset perkahwinan, bidang kuasa eksklusif untuk memutuskan hak-hak pihak-pihak kepada suatu perkongsian dalam aset-aset tersebut terletak pada Mahkamah Tinggi dalam melaksanakan bidang kuasa perkahwinannya. Bidang kuasa tersebut hanya boleh dilaksanakan 'when granting a decree of divorce or judicial separation' di bawah s 76 Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 ('APUPP'). Sehingga Mahkamah Tinggi memutuskan pembahagian aset-aset antara suami isteri, kepentingan kedua-dua pasangan dalam mana-mana aset tertentu masih tidak ditentukan dan tidak dipilih, dan oleh itu kepentingan itu tidak boleh dikaveatkan. Jika tujuan kemasukan kaveat persendirian adalah untuk melindungi aset perkahwinan daripada dilupus atau dialihkan, maka remedi yang lebih sesuai adalah untuk memohon injunksi di bawah s 102 APUPP. Defendan tidak memohon remedi tersebut tetapi mengambil jalan lebih mudah, jalan yang kurang halangan, dengan memasuki kaveat. Ini telah dilakukannya tanpa

membayar ansuran bulanan kepada bank pemegang gadaian, dan mengetahui yang ia bermaksud plaintif akan gagal dalam pinjaman itu. Walaupun bank pemegang gadaian telah memulakan tindakan pelupusan, defendan tidak membuat apa-apa percubaan untuk memperbetulkan kegagalan pinjaman tersebut. Oleh itu, dakwaannya bahawa dia telah melindungi aset perkahwinan dengan memasukkan kaveat tersebut adalah tidak kukuh (lihat perenggan 29 & 42).

(2) Walaupun bayaran awalnya sebanyak RM50,000 terhadap pemerolehan hartanah tersebut, defendan telah membenarkan plaintif menjadi pembeli mutlak dan pemilik berdaftar hartanah tersebut. Pinjaman bank adalah atas namanya. Plaintif berhujah bahawa fakta-fakta tersebut menunjukkan niat di pihak defendan bahawa sumbangannya adalah hadiah kepada plaintif; bahawa andaian pendahuluan terpakai menyebelahinya menidakkan apa-apa andaian suatu kepercayaan yang dihasilkan bagi pihaknya. Andaian pendahuluan boleh dipatahkan tetapi defendan telah gagal untuk mengemukakan keterangan mencukupi berkaitannya. Selain daripada membayar deposit RM50,000 dan ansuran enam bulan pada 2014, tiada keterangan apa-apa sumbangan kewangan secara langsung oleh defendan terhadap belian hartanah tersebut. Plaintif telah membayar baki harga belian dengan sumber kewangannya sendiri dan melalui pinjaman bank (lihat perenggan 43–44 & 46).

(3) Defendan telah gagal menunjukkan bahawa terdapat persoalan serius yang mewajarkan perbicaraan dan berkenaan ini juga, kaveat tersebut tidak kekal. Jika defendan berjaya mematahkan andaian pendahuluan dan menunjukkan bahawa niat pihak-pihak adalah agar plaintif memegang hartanah tersebut atas kepercayaan yang dihasilkan untuknya, maka itu adalah persoalan serius untuk dibicarakan; maka dia mempunyai kepentingan yang kapasiti yang membawa kepada pendaftaran dan itu adalah kepentingan yang boleh dikaveatkan. Defendan tidak menggambarkan apa-apa kepercayaan dalam Borang 19B atau dalam deklarasi statutorinya mahu pun dia telah mengemukakan keterangan yang mencukupi berkenaan tersebut. Dia tidak memfailkan apa-apa prosiding di mahkamah untuk menegaskan tuntutannya berhubung kepercayaan yang dihasilkan. Kegagalannya untuk memulakan apa-apa prosiding untuk menguatkuasakan kepentingan yang dikatakannya dalam hartanah tersebut adalah memudaratkan (lihat perenggan 50).

(4) Plaintif telah membuktikan bahawa imbangan kesesuaian atau imbangan keadilan berpihak kepada pembatalan kaveat tersebut kerana jika ia tidak dibatalkan, plaintif tidak mampu meneruskan jualan hartanah tersebut dan bank pemegang gadaian akan meneruskan dengan tindakan pelupusannya yang membawa kepada hartanah tersebut dilelong. Jika

A sememangnya defendan adalah pemilik benefisial, dia patut menyesuaikan pinjaman tersebut dan menyelamatkan hartanah tersebut daripada tindakan pelupusan. Hakikat bahawa dia tidak berbuat sedemikian dan membiarkan plaintif pada belas kasihan bank pemegang gadaian melemahkan kesnya untuk mengekalkan kaveat tersebut. Kaveat
B tersebut wujud tanpa apa-apa asas dan ia patut dibatalkan (lihat perenggan 51).

(5) Cara di mana kepentingan defendan yang dikatakan telah ditetapkan dalam dokumen-dokumen yang ditetapkan untuk kemasukannya adalah
C cacat dan kegagalan untuk memenuhi keperluan sah minimum untuk menyatakan sifat dan takat sebenar kepentingan benefisialnya yang dikatakan itu. Sifat tuntutannya adalah tidak jelas dan taksa. Dia tidak menunjukkan kepentingan yang pasti, tentu dan boleh didaftarkan dalam hartanah tersebut dan ini, dengan sendiri, adalah sebab yang
D mencukupi untuk mahkamah membatalkan kaveat tersebut (lihat perenggan 20–21).]

Notes

For a case on matrimonial home, see 7(3) *Mallal's Digest* (5th Ed, 2017
E Reissue) paras 4846.

For cases on caveatable interest, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2757–2760.

Cases referred to

F *Bethian Pty Ltd v Green* (1977) 3 Fam LR 11,579 (refd)
Chen Sook Peng v Wee Phean Yung [2004] 5 MLJ 116 (refd)
Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345 (refd)
Dato' Kadar Shah bin Tun Sulaiman v Datin Fauziah bt Haron [2009] 8 MLJ 510 (refd)
G *Dembitzer v Mills* [1980] 2 NSWLR 697, SC (refd)
Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212, PC (refd)
Francis Karel Rene Joseph Himpe v Theresa Gina Arteta Frias (2015) 3 MLRH 5553, HC (refd)
Goo Hee Sing v Will Raja & Anor [1993] 3 MLJ 610, HC (refd)
H *Hayes v O'Sullivan* (2001) 27 Fam LR 462, SC (refd)
Heng Gek Kiau v Goh Koon Suan [2007] 6 CLJ 626, CA (refd)
Heng Peng Hoo & Anor, Re [1989] 3 MLJ 103, HC (refd)
Iopollo v Iopollo (1978) 5 Fam LN N27 (refd)
Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd [1992] 1 MLJ 263,
I SC (refd)
Law Pik Tai @ Lau Paik Tai v Wong Nyiik Foon @ Wong Nyiik Kiew (F) [2002] MLJU 263, HC (refd)
Leake (formerly Bruzzi) v v Bruzzi [1974] 1 WLR 1528, CA (refd)
Lee Yu Lan v Lim Thain Chye [1984] 1 MLJ 56 (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)
Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh [2009] 1 MLJ 21; [2008] 6 CLJ 209, FC (refd)
Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors [1986] 1 MLJ 315 (refd)
Mosbert Berhad (in liquidation) v Stella D' Cruz [1985] 2 MLJ 446, SC (refd)
Pile's Caveats, Re [1981] Qd R 81 (refd)
Rajinder Kaur v Jeswant Singh [1987] 1 MLJ 214, SC (refd)
Registrar of Titles, Johore v Temenggong Securities Ltd [1976] 2 MLJ 44, PC (refd)
Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin (F) [1984] 1 MLJ 160 (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)
Tan Heng Poh v Tan Boon Thong & Ors [1992] 2 MLJ 1, CA (refd)
Week's Caveat, Re [1971] QWN 4 (refd)
Wong Kuan Tan v Gambut Development Sdn Bhd [1984] 2 MLJ 113, FC (refd)
Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 487, CA (refd)

Legislation referred to

Family Law Act 1975 [AUS] s 79
Law Reform (Marriage and Divorce) Act 1976 ss 76, 76(1), (3), 102
Matrimonial Causes Acts 1959–1966 [AUS] s 86(1)
National Land Code ss 323(1), 327, 327(1), 328, 329, Forms 19B, s 2, 19D
Real Property Act 1900 [AUS]
Transfer of Land Act 1893 [AUS] s 137

Yap Bell Pung (Joshua Vijayan Dharmaraj with him) (Bell & Lee) for the plaintiff.
Ira Nadhirah bt Ismail (Azharudin & Assoc) for the defendant.

Vazeer Alam J:

[1] This is an application by the plaintiff, under ss 327–329 of the National Land Code ('the NLC') for orders, inter alia, to remove a private caveat lodged by the defendant, on a piece of land held under Lot No 12105, PN No 36844 at Mukim Bukit Katil, District of Melaka Tengah, Melaka, on which a bungalow is erected bearing postal address No 2, Jalan Vista Kirana 3, Taman Vista Kirana, 75450 Gapam, Melaka ('the property').

[2] The plaintiff is the registered proprietor of the property. The defendant who is the plaintiff's husband lodged the private vide Presentation No 4924/2014 registered on 16 October 2014 against the whole of the property ('the caveat').

[3] The plaintiff contends that the caveat ought to be removed pursuant to s 327 of the NLC as the defendant does not have any caveatable interest on the property and consequent thereto prays that damages be assessed as provided under s 329 of the NLC. The defendant contends otherwise and states that he has a caveatable interest on the property and that the caveat ought to remain.

[4] The cause papers filed by the parties are as follows:

(a) the originating summons filed herein as encl 1 ('this originating summons');

(b) the statement to the originating summons ('the said statement');

(c) the affidavit sworn by the plaintiff on 3 December 2015 in support of this originating summons ('the plaintiff's affidavit support');

(d) the affidavit sworn by the defendant on 11 April 2016 in reply to the plaintiff's affidavit support ('the defendant's affidavit reply');

(e) the affidavit sworn by the plaintiff on 25 April 2016 filed as encl 10 in reply to the defendant's affidavit reply ('the plaintiff's affidavit reply 1');

(f) the affidavit sworn by the defendant on 5 May 2016 (*afidavit jawapan* No 2) in reply to the plaintiff's affidavit reply 1 ('the defendant's affidavit reply 2'); and

(g) the affidavit sworn by the plaintiff on 20 May 2016 filed as encl 11 in reply to the defendant's affidavit reply 1 ('the plaintiff's affidavit reply 2').

[5] Parties have filed lengthy written submissions and upon request of learned counsel I had also heard oral arguments. Having considered the application, supporting affidavits and submissions, I had allowed the plaintiff's application in the originating summons and ordered the removal of the caveat for the following reasons.

[6] The antecedent facts are as follows. The plaintiff and defendant were lawfully married on 14 February 2004 and have three children. After the marriage, the plaintiff and defendant had lived together successively in several matrimonial homes, the last of which is the property.

[7] The property was purchased in the course of their marriage at the price of RM900,000. The property was originally booked for purchase in the joint names of the plaintiff and defendant. The booking form dated 22 February 2011 marked as exh TTH1 of the defendant's affidavit in reply confirms this.

[8] The defendant had on 22 February 2011 paid the initial down payment/booking fee of RM5,000 to GJH Properties Sdn Bhd, the

vendor/developer of the property. Subsequently, on or about 24 March 2011, the defendant paid a further sum of RM45,000 to the vendor/developer towards the 10% deposit and part payment of the purchase price, hence making a total payment of RM50,000.

[9] The plaintiff states that prior to the execution of the sale and purchase agreement on 6 May 2011 ('the original sale and purchase agreement') the defendant had, by way of advancement, gifted this entire payment of RM50,000 to the plaintiff as his lawful wife ('gift'). And therefore, the plaintiff signed the sale and purchase agreement dated 26 May 2011 as the sole purchaser of the property. The original sale and purchase agreement dated 6 May 2011 is marked as exh NLL4 in the plaintiff's affidavit in support.

[10] The plaintiff obtained a bank loan of RM765,333 ('the loan') from Public Bank Bhd ('Public Bank Bhd') to part finance the purchase. Therefore, the balance between the purchase price (RM900,000) and the loan was RM134,667 and after deducting the gift (of RM50,000), the differential sum to be paid by the plaintiff was RM84,667 ('the differential sum'). The plaintiff states that she had paid the differential sum from her own financial resources. Upon settlement of the full purchase price, the vendor/developer transferred ownership of the property to the plaintiff and she is now the sole registered proprietor. The plaintiff thereafter charged the property to Public Bank Bhd through Presentation No 0400SC2011008395 on 5 July 2011 ('the charge') as security for the repayment of the loan. The plaintiff avers that she had paid the monthly loan repayment to Public Bank Bhd until December 2013.

[11] In or about the month of December 2013, the plaintiff left the property following matrimonial discord arising from, inter alia, the defendant's alleged drug abuse problem and issues of alleged domestic violence against the plaintiff. The plaintiff has since March 2014 permanently left the property and her two elder children are with her, whilst the youngest is with the defendant.

[12] Sometime on or about 13 October 2014, ie after the plaintiff had left the property, the defendant lodged the caveat claiming that he has a beneficial interest in the property. However, after entering the caveat, the defendant has to-date, not filed any consequent proceedings to claim any legal or beneficial interest in the property. On 4 June 2015, the plaintiff filed a divorce petition at the High Court in Malaya at Malacca vide Divorce Petition No 33–71–06 of 2015 ('the divorce petition'), which is pending adjudication.

[13] The plaintiff states that she is facing financial difficulties in servicing the loan. The defendant had, partly by utilising funds from their joint overdraft account, paid the loan instalments for six months ie January till June of 2014, and thereafter stopped. The plaintiff states that since the defendant no longer

maintained her and her two elder children, and further because the loan repayment is in default leading to Public Bank Bhd commencing foreclosure proceedings against the plaintiff, she was left with no option but to sell the property. She has since entered into a sale and purchase agreement dated 23 April 2015 with one Lee Hong Kok ('the new sale and purchase agreement') to sell the property. In order to regularise the loan repayment it is a condition of the sale that the said purchaser, Lee Hong Kok, shall continue to make payment of the monthly loan instalment to Public Bank Bhd until completion of sale. These payments by the purchaser will be taken as part payment of the purchase price. The plaintiff seeks the removal of the caveat to allow the sale to be completed.

[14] In considering this application, let me address the issue of law relating to private caveats and caveatable interest. It is trite law that only a person/body who has caveatable interest can lodge a caveat on the land. It is also trite that a caveator must prove the existence of his caveatable interest before the caveat is allowed to stand. To be caveatable these claims must represent claims that can lead to the making of a substantive entry on the register, either because the interest will become registrable or because it is one for which equitable relief by way of specific performance can be sought to enable ultimate registration. It is also the requirement of law that the basic legal requirements laid down by the NLC for compliance when lodging a private caveat must be strictly adhered to. Thus, only interests recognised by the NLC are protectable by caveat, see *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113 (FC).

[15] These principles were reiterated by Gopal Sri Ram JCA in the Court of Appeal case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 as follows:

> Caveatable Interest
>
> To paraphrase s 323(1)(a) of the Code, a private caveat may be entered at the instance of any person or body who claims either :
>
> (1) the title to the land; or
>
> (2) any registrable interest in land.
>
> The parameters of caveatability under s 323(1)(a) are therefore circumscribed by these words: 'title' and 'registrable interest'. It is only one who makes a claim to either of these in land may enter a private caveat.
>
> Although the words 'title' and 'registrable interest' are not defined by the Code, their meaning may be gathered from the scheme of the Code and from the indefeasibility provision, namely, s 340(1). The latter points to a bifurcation between title (the equivalent of the English fee simple) and registrable interests, that is, leases, charges and easements.
>
> In my judgment, the position that obtains under the Code, so far as is relevant to the

present appeal, may be stated in the following way. The Code creates three categories of interests in land. They are as follows.

Category 1: registrable interests in land

Only certain interests are capable of registration. Within this are two sub-categories, namely:

(a) Registered title. This may be for perpetuity or for a term of years. It pertains to ownership of land. The 'owner' is termed by the Code as a 'registered proprietor'; and

(b) Registrable interests falling short of ownership. These are leases, charges and easements.

Registration carries with it a bundle of rights, which includes, subject to any restriction imposed by the alienating authority, the right to effect a transfer of the particular registered interest. The Code, in s 340(1), confers indefeasibility upon registered title and interests in land. Section 340(2) creates exceptions which, if established, may operate to defeat such registered title or interest.

Category 2: interests that are incapable of registration

These include [emphasis added] tenancies exempt from registration, which may be protected by means of an endorsement upon the register document of title.

Category 3: caveatable interests

These are unregistered interests which are capable of protection by the entry of a private caveat. In the context of s 323(1)(a), it is only a claim to the interests falling under category 1(a) and (b) above that may be protected by the entry of a private caveat [emphasis added]. Cases falling under category 2 are not caveatable interests. A private caveat cannot, therefore, be entered by one who claims such an interest. Protection for such interests must be secured in the manner prescribed by the Code.

I fear that any other construction upon s 323(1)(a), especially one that places a meaning wider than that I subscribe to, may result in judicial disobedience to the will of Parliament: and that in my view should be avoided at all costs.

[16] Further, the learned judge in that case reiterates that the court in hearing an application under s 327(1) for the removal of a private caveat would be well advised to approach it in three stages, namely: (a) the caveator satisfying the court that he has a caveatable interest by examination of the grounds expressed in the private caveat lodgment documents (Form 19B and the accompanying statutory declaration); (b) the caveator satisfying the court that on the evidence presented in the affidavits his claim to an interest in the land raises a serious question to be tried; and (c) after having done so the caveator must go on to show that the balance of convenience tilts in favour of the caveat being extended until the disposal of the main action, see also the cases of *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263 (SC); *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113 (FC), *Mosbert Berhad (in liquidation) v Stella D'Cruz* [1985] 2 MLJ 446 (SC);

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212.

[17] In the present case, the defendant did not set out his claim to title or registrable interest in the property in the Form 19B. The defendant merely states in item 2 of the Form 19B as follows:

> 2. Alasan-alasan tuntutan ke atas *tanah/kepentingan itu ialah —
>
> Seperti yang dinyatakan dalam Surat Akuan saya yang telah dilampirkan di sini.

Meaning that the grounds for the entry of the caveat are as stated in the defendant's statutory declaration sworn on 13 October 2013, wherein he affirms as follows:

> 1. Saya, TING TIAN HWA (No. K/P: 721230-04-5029) adalah benefisial yang sah bagi hakmilik PN 36844, Lot 12105, Mukim Bukit Katil, Daerah Melaka Tengah, Negeri Melaka.
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> 2. Namun demikian, walaupun nama NG LI LIN (No. K/P: 761132-04-5038) telah digunakan sebagai pemilik di atas hakmilik tersebut, tetapi sebenarnya secara sahnya, tanah dan harta di atasnya mempunyai kepentingan saya sepenuhnya juga. Saya hanya membenarkan meletakhak namanya sebagai pemilik sahaja.
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> 3. Saya membuat akuan bersumpah ini dan memasukkan kaveat keatas hakmilik-hakmilik tersebut agar tidak timbul sebarang persenketaan di masa hadapan mengenai hakmilik tersebut dan saya meminta setiap waris saya menghormati akuan bersumpah saya ini dan memberi semula hakmilik-hakmilik ini kepada saya atau waris saya kelak apabila di minta berbuat demikian.

[18] The grounds set out by the defendant in his statutory declaration are vaguely that:

(a) the defendant is the 'benefisial yang sah' — by that it is unclear whether he means that he is a lawful beneficiary to the property or whether is he is the beneficial owner of the property or that he has some undisclosed beneficial interest in the property;

(b) the defendant had allowed the name of NG LI LIN (No K/P 761123–04–5038), ie the plaintiff, to be used as the registered owner of the property;

(c) the defendant has an interest in the property but he had chosen to vest the whole of the property in the name of NG LI LIN (No K/P 761123–04–5038); and

(d) the defendant lodged the caveat to avoid any future dispute regarding ownership of the property and the defendant further requests that his heirs respect his proprietorship of the property and return ownership to him in the future when asked.

[19] A scrutiny of the defendant';s application for entry of private caveat in the prescribed Form 19B and the statutory declaration annexed thereto shows that the grounds relied on by the defendant to lodge caveat is rather imprecise. The nature of the defendant';s claim as required by item 2 of Form 19B is vague and ambiguous. The defendant states in the statutory declaration 'Saya adalah benefisial sah.' However, the defendant fails to state how he acquired his beneficial interest in the property, ie was it by way of financial contribution towards its purchase or is it by way of an equitable interest in a matrimonial property or is it by way of a trust.

[20] The defendant does not state whether he was the one who paid the whole of the purchase price for him to be the sole beneficial owner of the property. Neither does the defendant state the amount of the defendant's contribution towards the purchase consideration. Nor does he even state the fact that Ng Lin Lin, the registered proprietor, is his lawful wife and that the property is their matrimonial home. Any person making a search on the defendant's caveat application form would have no notice of the exact nature of the defendant's interest in the property. The legal requirement to state the nature and exact grounds of the caveator's interest in the caveat lodgment form was emphasised by the Court of Appeal in *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487 and that requirement has been consistently reiterated by the courts.

[21] The law is clear in that the failure of a caveator to satisfactorily state the grounds to support a caveat was sufficient for the court to remove the caveat. Thus, I agree with the contention of learned counsel for the plaintiff that the manner in which defendant's alleged caveatable interest in the property is set out in the Form 19D is flawed and fails to meet the minimum legal requirements of stating the exact nature and extent of his alleged beneficial interest. Thus, I find that the defendant has not shown a definite, determinate, and registrable interest in the said property, and this by itself is sufficient for the court to remove the caveat, see the cases of *Goo Hee Sing v Will Raja & Anor* [1993] 3 MLJ 610; *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212; *Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin (F)* [1984] 1 MLJ 160; *Rajinder Kaur v Jeswant Singh* [1987] 1 MLJ 214; and *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719.

[22] Nevertheless, despite the lack these particulars in the Form 19B and the

statutory declaration, learned counsel for the defendant submits that the defendant's equitable interest in the property arises in two ways, ie firstly by reason of the fact that the property is the matrimonial home of the parties and that they have been residing in it from 2011–2013 when the plaintiff left the home; and secondly by reason of the defendant having contributed financially to the purchase of the property. Though these facts are not stated in the Form 19D or the statutory declaration, I will for sake of completeness consider these arguments.

[23] Let me consider the first issue, which is whether a spouse has a caveatable interest in matrimonial property that is registered in the name of the other spouse. When a man and a woman enter into a lawful union, all assets acquired during their marriage come under the purview of s 76 of the Law Reform (Marriage and Divorce) Act 1976. Section 76 of the Act gives the court power, when granting a decree of divorce or judicial separation, to order the division between the parties of assets acquired during the marriage, whether by their joint efforts or the sole effort of either party. The considerations for the exercise of that power are set out therein. Until the court exercises that power, those assets remain matrimonial assets, belonging to them — until such time as their respective rights thereto are determined by death, or by divorce or judicial separation.

[24] If during a marriage, one party to the marriage intends to dispose of property acquired during the marriage with the object of depriving his or her spouse of any rights in relation to that property, that other spouse may immediately bring matrimonial proceedings, and apply for an injunction under s 102 of the Law Reform (Marriage and Divorce) Act 1976.

[25] Section 102 of the Law Reform (Marriage and Divorce) Act 1976, gives the court power to grant an injunction preventing such disposition, or if any disposition has been made within the preceding three years, with such an object on the part of the spouse making the disposition, to set aside that disposition. A spouse therefore has a remedy in family law, to protect his or her interest in assets acquired during his or her marriage.

[26] The defendant in this case chose not to seek that remedy. Had he done so, he would have to show that the plaintiff was disposing of the property with the intention of depriving him of his rights in relation to assets acquired during the marriage. Now, would he have been able to do so? Is this the only asset of value acquired by the parties during the marriage? Are there substantial other assets under his or her control from which any legitimate claim by him to a share of assets acquired during the marriage can be met? What assurance is there that in exercising it's discretion in dividing the assets, that the family court will grant any particular property to him, or apportion the assets in any

particular manner? Can it be inferred from her conduct that the plaintiff intends to deprive him of his rights, so that he will suffer prejudice if the plaintiff, in these circumstances, sells the property? These are questions that the defendant would have to satisfactorily answer the court in order to succeed on such an application. And from the facts disclosed, it seems more probable than not that the defendant would not be able to satisfy the court of these matters before the court grants any injunctive relief.

[27] It must be remembered that the power of the court sitting in its matrimonial jurisdiction is to divide the assets acquired during the marriage. It is not a power to divide each asset, where the assets are many, as in this case. It is at once apparent from the facts that getting such an injunction in the circumstances of this case would have been difficult for the defendant.

[28] The plaintiff, in her affidavits, alleges that the defendant has appropriated monies payable to the plaintiff personally by Exotic Legacy Sdn Bhd in the sum of RM115,000 thus depriving her of funds to service the loan. In para 20 of her affidavit in support, the plaintiff alludes to the fact that the defendant has also failed to contribute to the support of two of his children, and that this has forced her to put up the property for sale. These facts remain uncontroverted.

[29] It seems obvious that insofar as the defendant claims to be trying to preserve a matrimonial asset, the defendant took the easier route, the path of least resistance. He chose to enter a caveat on the property instead of seeking injunctive relief. This he had done without paying the monthly instalments to Public Bank Bhd, knowing well that this would mean the plaintiff would be in default of the loan. Though the chargee bank had commenced foreclosure action, the defendant did not make any attempt to regularise the loan default. Thus the defendant's claim that he was protecting a matrimonial asset by lodging the caveat rings hollow.

[30] In family law, it is trite that a spousal claim to a share in the matrimonial home is indeterminate until the court makes an order for division of the matrimonial assets and properties and the time to do so is when the court makes a decree of divorce or judicial separation. The Federal Court in interpreting s 76(1) and (3) of the Law Reform (Marriage and Divorce) Act 1976 confirmed this in *Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2009] 1 MLJ 21; [2008] 6 CLJ 209. The question that arises then is whether a spouse can lodge a caveat based on such indeterminate right.

[31] Skinner J (later JCA) in *Law Pik Tai @ Lau Paik Tai v Wong Nyiik Foon @ Wong Nyiik Kiew (F)* [2002] MLJU 263 in construing a similar issue held that a spouse's interest in matrimonial assets and properties, when no order for

distribution has been made under s 76 of the Law Reform (Marriage and Divorce) Act 1976, is a right in future which is incapable of being a caveatable interest, as a caveatable interest can only arise from a right 'in praesinti' and not a right 'in futuro'. The following passage from the judgment is apposite as it sets out the learned judge's reasoning for that proposition:

> It is also my view that although the right of a wife to claim for a division of matrimonial assets is a right which may affect or concern land and eventually even entitle a wife to a transfer thereof or to the proceeds thereof, yet the right is not a presently enforceable right in land but one that is contingent and which may only become enforceable at a future date. In *Goo Hee Sing v Will Raja & Anor* [1993] 3 MLJ 610, the issue before the court was whether in the face of a restriction in interest indorsed on the title to the disputed land, the caveat filed by the plaintiff there was a nullity. In answering that question, Shankar J (as he then was) held that in order for the plaintiff to file a caveat, he must have a title to land or a right thereto 'in praesinti' and not to some contingent title or right thereto 'in futuro' and that until the consent of the 'Pihak Kuasa Negeri' was first irrevocably obtained, a prospective purchaser can have no caveatable interest in such land. I respectfully agree with the reasoning there and would regard the claim of the defendant here to a right in the division of the said lands as a contingent right 'in futuro' and not capable of supporting a caveatable interest in land.
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> ...
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> ... claim for a division of the matrimonial assets under the Act, being an unascertained right until an order is made by the court when granting a divorce or judicial separation, cannot be in any better position than the right of a residuary beneficiary under the will of a deceased who lodges a caveat against land belonging to the estate and where it has been held on high authority that residuary beneficiaries are not 'entitled to' or 'beneficially interested in' land forming part of an estate and therefore do not have a caveatable interest in land belonging to the estate until the administration of the estate is complete and the residue fully ascertained.

The principle that the unascertained rights of beneficiaries of an undistributed estate of a deceased is incapable of giving rise to a caveatable interest alluded to by Skinner J in that decision is found in the judgment of the Court of Appeal in *Tan Heng Poh v Tan Boon Thong & Ors* [1992] 2 MLJ 1. Although the correctness of this decision in another respect, not relevant for present purposes, has been called into question and effectively reversed (see *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345), it remains as authority for the proposition that a beneficiary under a will has no caveatable interest until his testator's estate has been fully administered.

[32] Similarly, in *Chen Sook Peng v Wee Phean Yung* [2004] 5 MLJ 116, when domestic problems arose the husband claimed an interest in the matrimonial home registered in the name of the wife on grounds that it had been purchased from the profits of a transport company that both spouses ran

and that the husband had also paid three of the monthly loan installments. The husband claimed to have a share in the matrimonial home and lodged a private caveat. The wife applied to remove the caveat under s 327 of the NLC and VT Singham J in allowing the removal held that although s 76 of the Law Reform (Marriage and Divorce) Act 1976 gave the court the discretion to decide and order a division of the community property of the married couple, this was dependent and subject to the individual contribution by the parties. If the respondent succeeded in his claim, in the divorce action, on his right to a share to the said property based on his contributions, that fact alone would not directly give the respondent a caveatable interest to the said property. This was because the respondent could be awarded the value of the money based on his contribution or given some other property in lieu thereof. Any decision or order to be made in the divorce petition would be at the court's discretion and it may not necessarily be one in which the court gives any one property in whole or in part to one spouse, see *Re Heng Peng Hoo & Anor* [1989] 3 MLJ 103, *Lee Yu Lan v Lim Thain Chye* [1984] 1 MLJ 56 and *Leake (formerly Bruzzi) v v Bruzzi* [1974] 1 WLR 1528.

[33] The pronouncements of law made by Skinner J and VT Singham J in the above cases are similar to those made by courts in Australia. And since our Torrens system of land registration follows that of Australia, I propose to consider the position in that jurisdiction as persuasive guidance.

[34] In *Re Week's Caveat* [1971] QWN 4, a case Skinner J had referred to in *Law Pik Tai*, the husband had applied to remove a caveat entered by his wife on property of which he was the registered proprietor, in which she claimed a half-share in the said property. The wife had filed a petition for divorce, seeking dissolution of the marriage, as well as settlement for her benefit of the husband's interest in the said property. The husband claimed that the wife had no caveatable interest in the said property. The judge noted that the wife's basis for the caveat was that the court will or may make an order for settlement of the property in her favour pursuant to the provisions of s 86(1) of the Matrimonial Causes Acts 1959–1966. Hoare J held that the mere possibility of the court exercising jurisdiction under the Matrimonial Causes Act to make an order for settlement of matrimonial property in favour of a wife is not an estate or interest in the land which is capable of supporting a caveat.

[35] Similarly, in *Bethian Pty Ltd v Green* (1977) 3 Fam LR 11,579 Powell J ordered the wife to withdraw a caveat that she had lodged on a property which was the former matrimonial home, and the subject of proceedings in the Family Court. The court held that the wife's claim on the property (which was held by a company in which she claimed she had been fraudulently deprived of her shareholding, by the husband) was not a claim for an interest in the real estate, but rather a claim for relief in the Family Court.

[36] And in *Re Pile's Caveats* [1981] Qd R 81, the wife had entered two caveats on certain property held in trust by the applicants. The husband and wife were living apart. No matrimonial proceedings had yet been filed. The wife had, however, applied for injunctions to restrain the husband and the two applicants from dealing with the said lands. The said properties had been purchased in the joint names of the husband and wife, but later transferred to the trustee companies. The wife had at that time agreed to the said transfers on a representation by the husband that the beneficial interest in the said lands would not be affected. The court held that the existence of a prima facie equity to relief involving land is not necessarily the same as the prima facie existence of an interest in the land. The court further held that, as the caveator claimed a personal equity enforceable against her husband and that the trustees to have the lands reconveyed to her because of the fraud of her husband, the caveats should be removed, as these were not caveatable interest.

[37] In *Hayes v O'Sullivan* (2001) 27 Fam LR 462 the Supreme Court of Western Australia held that a claim under s 79 of the Family Law Act 1975 is not an interest in land within the meaning of s 137 of the Transfer of Land Act 1893 (WA), and therefore is not a caveatable interest, and that a spouse cannot rely on a constructive trust as a caveatable interest. At para 20, (p 466 of the report) the court referred to *Iopollo v Iopollo* (1978) 5 Fam LN N27 (unreported) where the full court had held that a claim for settlement of property under the Family Law Act is not an interest in land within the meaning of s 137 of the Transfer of Land Act and accordingly is not a caveatable interest. At para 27 (p 467 of the report) the court also referred to the case of *Dembitzer v Mills* [1980] 2 NSWLR 697 where the Supreme Court of New South Wales had said that if the defendant were apprehensive that the plaintiff would dispose of the land, his remedy was not a caveat under the Real Property Act based on an existing estate or interest, but an injunction by the Family Court restraining the plaintiff from dealing with the land and so preserving the property which might in the end be the subject of an order of the Family Court.

[38] A similar observation was made by Skinner J in *Law Pik Tai* where the learned judge in removing the caveat lodged by defendant had opined that, though the decision may seem harsh, the defendant is not without remedy in that under s 102 of the Law Reform (Marriage and Divorce) Act 1976, the court has the power upon an application in any pending matrimonial proceedings to grant an injunction to prevent the disposition of matrimonial property in the circumstances therein described.

[39] Learned counsel for the defendant argues to the contrary and refers to the case of *Francis Karel Rene Joseph Himpe v Theresa Gina Arteta Frias* (2015) 3 MLRH 5553, where in maintaining a private caveat lodged by the plaintiff-husband to protect assets acquired during the marriage, and the

distribution of which would be decided upon the dissolution of the marriage, the High Court had held that a beneficial interest may be created by way of constructive or resulting trust arising from matrimonial assets and that s 323(1) of the NLC was wide enough to include such beneficial interest as one that is capable of maintaining a caveat. The court thus held that a caveatable interest arises from such constructive or resulting trusts. Learned counsel for the defendant had urged the court to follow this case to allow the caveat to remain.

[40] I am, with due respect, unable to accept that argument. I am more inclined to accept the proposition of law expounded by Skinner J and VT Singham J in the cases referred to earlier as I find the legal reasoning therein more compelling and convincing. The judgment in *Francis Karel Rene Joseph Himpe* did not consider the in depth discussion of legal principles regarding matrimonial properties in both the judgments of Skinner J and VT Singham J. A reading of the judgment in *Francis Karel Rene Joseph Himpe* shows that the learned judge had not been referred to the earlier judgments of Skinner J and VT Singham. If it had been done, the decision in that case may very well be different. Further, in *Francis Karel Rene Joseph Himpe,* while waiting for the dissolution of his marriage, the plaintiff sought to protect the matrimonial assets by lodging the caveat in question on grounds that the properties are held on a constructive or resulting trust. Now, that reasoning cannot apply to the facts of this case as such a fact is not alluded to in the statutory declaration in support of the Form 19B.

[41] Additionally, in respect of assets acquired during a marriage, ie, matrimonial assets, the exclusive jurisdiction to decide on the rights of the parties to a share of such assets lies with the High Court exercising its matrimonial jurisdiction. That jurisdiction can only be exercised 'when granting a decree of divorce or judicial separation', under s 76 of the Law Reform (Marriage and Divorce) Act 1976, as decided by the Federal Court in the case of *Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2009] 1 MLJ 21; [2008] 6 CLJ 209. Thus, considering that the assets in these cases came under the purview of s 76 of the Law Reform (Marriage and Divorce) Act 1976, until the High Court in its matrimonial jurisdiction decides the apportionment of these assets between the husband and wife, the interest of both spouses in any particular asset remains indeterminate and inchoate, and thus the interest of the spouse cannot be a caveatable one. If the purpose of the lodgment of a private caveat were to merely protect matrimonial assets from being disposed or dissipated, as it seems to be in *Francis Karel Rene Joseph Himpe,* and in this case too, then the more appropriate remedy would be an injunction under s 102 of the Law Reform (Marriage and Divorce) Act 1976. In this regard I am also inclined to follow the persuasive Australian authorities referred to above and in particular *Hayes v O'Sullivan* (2001) 27 Fam LR 462 where the court held that a claim for distribution of matrimonial assets in

matrimonial proceedings is not an interest in land and therefore is not a caveatable interest, and that a spouse cannot rely on a constructive trust as giving rise to a caveatable interest. The same applies in our case, as the defendant is claiming a prima facie equity in an asset acquired during his marriage to the plaintiff. It is therefore clear that there is no basis in law to enter a caveat for an inchoate, indeterminate interest, when an alternative and more suitable remedy is available, between parties who are husband and wife. On the basis of it being a matrimonial asset, the defendant has not shown any basis for his claim that he has a caveatable interest in the property.

[42] On the second ground of the defendant's alleged contribution towards the purchase of the property giving rise to an equitable interest in the property my views are as follows. The defendant had paid the said sum of RM50,000 as the initial down-payment for the property to be purchased in their joint names. The defendant also states that the monthly instalments to repay the Loan were provided by him. On this basis the defendant is arguing that a presumption of resulting trust arises. However, despite the initial advancement of RM50,000, the defendant allowed the plaintiff to be the sole purchaser, and the sole registered owner. The bank loan is in the sole name of the plaintiff. These facts, the plaintiff contends, clearly points to an intention on the part of the defendant that his contribution would be a gift to the plaintiff, his lawful wife. The plaintiff further argues that as the parties, are not strangers but are in fact lawful husband and wife, a presumption of advancement applies in favour of the plaintiff.

[43] In law the presumption of advancement arises because of the relationship of the parties, and when such presumption arises it would negate any presumption of a resulting trust. This means that a resulting trust would not arise if the person receiving were the giver's wife or child or someone to whom the giver stands in loco parentis. However, the presumption of advancement can be rebutted if the party claiming otherwise can show that at the time of the transaction there was between say the husband (giver) and the wife (receiver) a common intention that it was to be otherwise.

[44] The onus to show this would be on the giver, see *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 (FC); *Heng Gek Kiau v Goh Koon Suan* [2007] 6 CLJ 626 (CA); and *Dato' Kadar Shah bin Tun Sulaiman v Datin Fauziah bt Haron* [2009] 8 MLJ 510.

[45] However, I do not find the defendant having discharged this onus by adducing sufficient evidence in this regard. Apart from the RM50,000 paid initially towards the deposit sum and the six monthly instalments paid in 2014, there is no evidence of any direct financial contribution by the defendant towards the purchase of the property. Aside from these sums of monies paid by

the defendant, the plaintiff had paid the balance of the purchase price with her own financial resources and through the loan from Public Bank Bhd.

[46] At this stage it is incumbent upon the defendant to show that there are serious questions meriting a trial. Gopal Sri Ram JCA (as he then was) elaborated in *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315 that even if the caveator has correctly stated his claim to a registrable interest in the caveat entry form, the caveator must still adduce evidence to prove the existence of such an interest before the caveat may be allowed to stand. This, I find the defendant has failed to do and on this score too the caveat cannot stand, as no serious question for trial is established.

[47] Granted that if the defendant were to successfully rebut the presumption of advancement and show that the intention of parties was for the plaintiff to hold the property on a resulting trust for him, then he would have an interest capable of leading to registration. And that would be a caveatable interest. Again it would be important to point out that the defendant has not alluded to any such trust in the Form 19B or the statutory declaration nor has he adduced sufficient evidence in this regard.

[48] Now, if the defendant had adduced sufficient evidence in this regard, I accept that the fact of whether there is a presumption of advancement or a presumption of resulting trust is a serious question to be tried. Even if the defendant surmounts this hurdle, it must be gainsaid that the defendant has not filed any proceedings in court to assert his claim of a resulting trust, nor has he sought any consequential relief in respect of this particular asset, after entering the caveat. There are, however, matrimonial proceedings pending, which were filed by the plaintiff more than seven months after the defendant entered the caveat. Those matrimonial proceedings will in due course decide the rights of the parties to a share each of the assets acquired during their marriage, but not on the issue of whether the defendant is the owner of the whole of the property by virtue of a resulting trust.

[49] Now, even if the contents of the Form 19D and the statutory declaration is construed to mean that it discloses some equitable interest capable of leading to registration, and thus giving rise to a caveatable interest, there is another serious and fatal impediment to the defendant's claim. The defendant to date has not instituted any proceedings to establish his rights and interest in the property. The defendant's failure to commence any proceedings whatsoever to enforce the alleged interest, interim protection of which had been secured by the entry of the caveat is fatal. Lord Diplock in *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44 (PC) opined that:

> The purposes of a private caveat is to preserve the status quo pending the taking of

timeous steps by the applicant to enforce his claim to an interest in the land by proceedings in the courts.

And in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 (PC), the same learned judge stated the proposition in almost similar terms. This principle has been consistently applied by the courts in applications for removal of caveats, when the caveator after having lodged the caveat does nothing more to prosecute his claim.

[50] In any event, I find that the plaintiff has established that the balance of convenience or the balance of justice lies in favour of the caveat's removal as otherwise the plaintiff would not be able to proceed with the sale of property and Public Bank Bhd would continue with the foreclosure action, leading to the auction sale of the property. If indeed the defendant is the beneficial owner, he should have stepped in to regularise the loan and save the property from foreclosure action. The fact that he has chosen not to do so, thus leaving the plaintiff at the mercy of the chargee bank, diminishes his case for the caveat to remain. Therefore, to my mind it is clear that the caveat stands alone, entirely without any basis, and that it ought to be removed.

[51] Thus, I allowed the plaintiff's application as in prayers (1) and (2) of the originating summons and ordered the removal of the caveat. Cost of RM8,000 to be borne and paid by the defendant to the plaintiff.

Order accordingly.

Reported by Ashok Kumar